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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICHELLE PADILLA,

Plaintiff and Respondent,

v.

MRA HOLDING, LLC et al.,

Defendants and Appellants.

B172540

(Los Angeles County
Super. Ct. No. SC078520)

APPEAL from an order of the Superior Court of Los Angeles County, Paul G. Flynn, Judge. Affirmed.

Richardson & Patel, Ronald E. Guttman and Victor T. Fu for Defendants and Appellants.

Cervantes & Associates and Lisa A. Cervantes for Plaintiff and Respondent.

INTRODUCTION

Defendants MRA Holding, LLC, Mantra Films, Inc., Joseph R. Francis, Ventura Distribution, Inc., and Point .360 d/b/a Woodholly Productions appeal from the order of the trial court denying their motions to dismiss the invasion of privacy, false light, unfair and fraudulent business practices, and deceptive advertising claims against them by plaintiff Michelle Padilla pursuant to Code of Civil Procedure¹ section 425.16, the anti-SLAPP (Strategic Lawsuits Against Public Participation) statute. Defendants claim that their marketing and distribution of *Girls Gone Wild* videos involved an issue of public interest and the trial court erred in ruling section 425.16 did not apply. Inasmuch as defendants failed to pass the threshold public issue requirement, section 425.16 does not apply. We affirm the order.

FACTS

In May 1999, plaintiff was celebrating Memorial Day weekend at Lake Havasu, California. In a public part of the lake, plaintiff stood on top of a boat and removed her bikini bathing suit top. Unbeknownst to plaintiff, photographers working for defendants videotaped her actions. After this incident, the defendants acquired, edited, assembled, produced and distributed clips of plaintiff exposing her breasts in *Girls Gone Wild*, a video that depicts a variety of young women exposing their buttocks and genitals in public places.² In addition, defendants marketed *Girls Gone Wild* through paid television

¹ Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

² *Girls Gone Wild* is a documentary videotape series which depicts young men and women on beaches, along streets, in bars or in other public places. The young women commonly consent to be photographed and videotaped in various stages of undress in exchange for a nominal gift in the form of costume jewelry, usually consisting of long strands of brightly-colored plastic beads and trinkets. Plaintiff was filmed and is included

commercials and pop-up ads on the internet and cable television. In November 1999, plaintiff first learned that defendants had used her photographic image in a television commercial for *Girls Gone Wild*. Plaintiff sent to defendants cease and desist notices.

On August 12, 2003, plaintiff filed a complaint against defendants for (1) invasion of privacy—appropriation of likeness under common law, appropriation of voice, photograph and likeness for commercial purposes, placement in false light, and (2) unfair and fraudulent business practices, based on the unsolicited videotaping and her inclusion in the *Girls Gone Wild* videos, advertising and commercials.

Defendants filed motions to strike pursuant to section 425.16. In the motions to strike, they claimed that the videotaped series was made in furtherance of their constitutional right to free speech in connection with a public issue. The trial court denied the motions to strike, holding that section 425.16 was inapplicable.

CONTENTIONS

Defendants contend that plaintiff's complaint falls within the ambit of the anti-SLAPP statute. We disagree.

Defendants further contend that since plaintiff's complaint falls within the ambit of the anti-SLAPP statute, plaintiff's complaint must be dismissed, in that she failed to demonstrate a probability of prevailing on her claim. Inasmuch as defendants failed to meet their threshold public interest showing, we need not consider this issue.

Defendants assert that they are entitled to recover their attorney's fees and costs. We disagree, in that defendants did not prevail on their special motions to strike.

in *Girls Gone Wild—College Spring Break*, *Girls Gone Wild—College Coeds, Volume 2*, and a DVD that combines *College Spring Break* with additional footage. These one-hour filmed documentaries consist of a collection of videotaped segments of young men and women congregating and celebrating Memorial Day Weekend in May 1999.

DISCUSSION

Anti-SLAPP Statute

Section 425.16 was enacted to eliminate meritless actions at an early stage. (*Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 672.) The statute provides, in relevant part: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).) Courts have interpreted this language as creating a “two-step process for determining whether an action is a SLAPP.” (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

In the first step, the court decides “whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) It is the moving defendant’s burden to demonstrate that “the act or acts of which plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech . . . in connection with a public issue.’” (*Ibid.*) In step two, the burden then shifts to plaintiff to demonstrate a probability that plaintiff will prevail on the claim. (§ 425.16, subd. (b); *Equilon Enterprises, supra*, at p. 67.)

The issue on appeal is whether the acts alleged in the complaint fall within the ambit of protected activity under section 425.16, a question of law we review de novo. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) Because we conclude defendants did not meet their threshold burden, we need not consider whether plaintiff met her burden of establishing a probability of success on the merits. (See *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 929-930.)

The Public Interest Requirement

Section 425.16, subdivision (e), divides activities protected by the section into four categories. Plaintiff and defendants agree that the challenged acts in the instant case fall into the last category of subdivision (e) acts, which is “any other conduct in furtherance of the exercise of the constitutional right of . . . free *speech in connection with a public issue or an issue of public interest.*” (Italics added.) (§ 425.16, subd. (e)(4).) As the statute’s plain language indicates, if the activity at issue falls within the ambit of subdivision (e)(4), defendant needs to demonstrate that it concerns an issue of public significance, which is not required for activities that fall under subdivisions (e)(1) and (2). (§ 425.16, subd. (e); *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1123.) Therefore, if defendants fail to pass this public issue threshold, their alleged acts of invasion of privacy and false light are not protected by section 425.16.

The statute does not provide a definition for “a public issue” or “an issue of public interest,” and “it is doubtful an all-encompassing definition could be provided.” (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132.) However, the Legislature intended that there be “some attributes of the issue which make it one of public, rather than merely private, interest.” (*Ibid.*) So we look to decisional authorities for guiding principles in determining whether an act is “in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e)(4).)

The major case that provides such guidance is *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO*, *supra*, 105 Cal.App.4th 913 (*Rivero*). In *Rivero*, the court noted, “Few published cases have interpreted the terms ‘public issue’ and ‘public interest’ as they are used in section 425.16, subdivision (e).” (*Id.* at p. 919.) The *Rivero* court thoroughly explored the two terms as interpreted by these “[f]ew published cases” and concluded, “None of these cases defines the precise boundaries of a public issue, but in each of these cases, the subject statements either concerned a person or entity in the public eye, conduct that could directly affect a large number of people beyond the direct participants or a topic of widespread, public interest.” (*Id.* at p. 924; citations omitted.)

Person in the Public Eye

The first *Rivero* factor asks whether the subject of the defendants' activities is a person in the public eye. (*Rivero, supra*, 105 Cal.App.4th at p. 924.) In this case, the plaintiff was not in the public eye; she was merely a college student on vacation who took off her bathing suit top. More connection is required between the plaintiff's cause of action and the media attention which makes plaintiff a public figure.

In *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345, the United States Supreme Court defined a public figure: "For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

In *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798 (*Seelig*), a former contestant on the television show *Who Wants to Marry a Millionaire* filed defamation claims because a local radio program called her a "chicken butt" and a "local loser" in a discussion about the television show. (*Id.* at pp. 802-806.) The court found that by participating in the television show, plaintiff "voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media." (*Id.* at p. 808.) Accordingly, she was a public figure. The *Seelig* court did not predicate the ruling on the finding that both the television show and plaintiff received tremendous media coverage. It pointed out because the challenged radio show focused on why plaintiff participated in the television show, it was "derivative" of the television show. (*Id.* at p. 807.) This indicated a strong connection between the radio show from which plaintiff's claims arose and the media attention that placed the television show and the plaintiff in the public eye.

In this case, unlike the situation in *Seelig*, plaintiff's image did not appear in a television show which would generate considerable debate in the media on the condition of American society and marriage. Plaintiff did not voluntarily choose to participate in the videos and the advertising and therefore did not voluntarily subject herself to scrutiny

by the public and the media. Furthermore, plaintiff “did not assume any role of especial prominence in the affairs of society, . . . and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.” (*Time, Inc. v. Firestone* (1976) 424 U.S. 448, 453.)

In *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal. App. 4th 226 (*Sipple*), there was a close relationship between plaintiff’s status as a nationally known political consultant and the domestic violence allegation underlying his claims. (*Id.* at p. 230.) Division Two of this Court found that plaintiff was a public figure, in that he had built up his career and status as an influential man in national politics by capitalizing on domestic violence issues in his advertising campaigns for clients like George W. Bush. (*Id.* at p. 238.)

Media attention has some connection with plaintiff’s causes of action. But plaintiff was not in the public eye, in that the media attention she received was limited to videos that had to be ordered from the internet and during late night cable television commercials, and advertisements that were directed to a select audience.

The public figure test sometimes also reflects a court’s concern that a powerful individual or entity may affect many people or affect them in an inappropriate manner. (See *Sipple, supra*, 71 Cal.App.4th 226; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, supra*, 29 Cal.4th at p. 68.) For example, the *Sipple* court was concerned about plaintiff’s ability to use his “influential position and his ready access to the press” to take advantage of the legal system. (*Sipple, supra*, at p. 239.) In *Church of Scientology v. Wollersheim, supra*, Division Three of this Court found public interest mainly based on a concern “the powerful church” might have an impact on the lives of many individuals due to the amount of media coverage it received and the extent of its membership and assets. (At pp. 650-651.) However, there is no need for such concern regarding an ordinary college student on vacation, whose only limited media attention comes from being photographed and having her image shown in two videos showing “flashing” at

public gatherings during Mardi Gras and Spring Break. Plaintiff is not a person in the public eye.

Large Number of People

The second *Rivero* factor asks whether the defendants' activity could affect large numbers of people beyond the direct participants. (*Rivero, supra*, 105 Cal.App.4th at p. 924.) In this case, the videos are marketed to a particular audience interested in viewing women in various stages of undress. Defendants argue that the activities of young people during events such as Mardi Gras and Spring Break have been the subject of considerable debate and commentary by the media and the public at large.

The case the *Rivero* court cited for this factor was *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468. In *Damon*, an allegedly defamatory newsletter was circulated to members of a large homeowners association. It criticized the performance of the manager of the association and urged residents to replace the manager with a professional management company. (*Id.* at pp. 472-473.) The *Damon* court defined "public interest" as including "not only governmental matters, but also private conduct that impacts a broad segment of society." (*Id.* at p. 479.) Therefore, the court found public interest involved because the newsletter "concerned the very manner in which this group of more than 3,000 individuals would be governed." (*Id.* at p. 479.) In contrast, defendants make no showing what "broad segment of the society," if any, plaintiff's conduct affected.

Ludwig v. Superior Court (1995) 37 Cal.App.4th 8 arose from public environmental objections to the construction of a mall. Development of a mall with potential environmental effects such as increased traffic is presumed to affect a large number of people and has customarily been held a matter of public interest. (*Rivero, supra*, 105 Cal.App.4th at p. 923.) In contrast, videos of women "flashing" invites no such presumption.

Topic of Widespread Public Interest

The third *Rivero* factor asks whether the defendants' activity involves a topic of widespread public interest. (*Rivero, supra*, 105 Cal.App.4th at p. 924.) "[I]t is not enough that the [conduct] refers to a subject of widespread public interest; the [conduct] must in some manner itself contribute to the public debate. [Citations.]" (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898.)

Defendants argue that the actions of young people "flashing" at public gatherings and festivals such as Mardi Gras and Spring Break have generated a great deal of public interest and media attention and have been a widespread subject of public debate about American society.

The case of *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623 illustrates this factor. In *M.G.*, the claims arose from the use of photographs of some molestation victims by HBO and a sports magazine to illustrate stories on child molestation in youth sports. (*Id.* at pp. 626-627.) The court ruled that the public issue requirement was satisfied because "the broad topic of the article and the program was not whether a particular child was molested but rather the general topic of child molestation in youth sports, an issue which, like domestic violence is significant and of public interest." (*Id.* at p. 629.) The court made it clear, however, that the narrow question of the identity of molestation victims did not properly reflect a public issue. (*Ibid.*) In other words, if the only interest in the challenged article and program had been disclosing molestation victim identities, the *M.G.* court would have been reluctant to find the public issue requirement satisfied. In this case, defendants' only interest was in showing and advertising plaintiff in a state of undress; the video was not prepared to provoke a general discussion on the mores of young adults.

The instant case is also distinguishable from *Sipple, supra*, 71 Cal.App.4th 226. In *Sipple*, the court found the alleged defamatory magazine article accusing plaintiff, a nationally known political consultant, of domestic violence, concerned public issues. Domestic violence was a topic implicating public issues. (*Id.* at p. 238.) Here, it cannot be said that the videos represented issues of widespread public interest. The videos and

advertising, and the marketing efforts, are only intended to increase sales for defendants' benefit, they are not participating in a public dialogue about the condition of American society in general. Since plaintiff is not a public figure, defendants' advertising and videotaping plaintiff taking off her bikini top in a public area is not a matter of public interest. Furthermore, advertisements about "flashing" are not about the general topic of societal mores.

Accordingly, we conclude that defendants failed to meet any of the *Rivero* factors for the public issue requirement. Defendants did not make a threshold showing that plaintiff's action is one arising from statutorily protected activity.

Attorney's Fees

Section 425.16, subdivision (c), provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

Defendants did not prevail on their special motions to strike. Accordingly, we deny their request for attorney's fees pursuant to section 425.16.

Additionally, the record does not disclose any evidence that defendants brought the motions to strike solely to cause unnecessary delay. Neither does it show frivolousness. Therefore, we also deny plaintiff's request on appeal for attorney's fees pursuant to section 425.16.

The order is affirmed.

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SPENCER, P. J.

We concur:

MALLANO, J.

SUZUKAWA, J.^{*}

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.